IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT

D.B. CIVIL SPECIAL APPEAL (WRIT) NO.363/2004

Nagar Chand Bhargava Vs. State of Raj. & Ors.

Date : 17.08.2006

PRESENT

HON'BLE MR. JUSTICE RAJESH BALIA
HON'BLE MR. JUSTICE GOPAL KRISHAN VYAS

Mr. R.N. Upadhyay for the appellant.
Mr. L.R. Upadhyay, Dy. Government Advocate

BY THE COURT:- (PER HON'BLE RAJESH BALIA,J.)

Heard learned counsel for the parties.

This appeal is directed against the judgment of learned Single Judge dated 15th April, 2004 dismissing the writ petition in limine on the ground that the petitioner has an alternative remedy of appeal before the Rajasthan Civil Service Appellate Tribunal against the impugned orders.

It is trite to say that ordinarily where a

remedy by way of appeal is provided, the extra ordinary jurisdiction under Article 226/227 is not to be invoked but one of the well-known exceptions to the rule is that where the impugned order is passed in breach of the principles of natural justice affecting the rights of the petitioner adversely and secondly where the petitioner's fundamental rights are affected, the rule of non-interference in such matters is ordinarily not adhered to.

The impugned judgment under appeal shows that it is founded on erroneous assumption that the order under challenge is Annex.5 dated 16.3.1993 by which the appellant has been transfered to Collector's office in Nagour as Stenographer from the office of District Education Officer (Boys and Girls), Nagour. The petitioner has nowhere challenged the order of the transfer but he is aggrieved of the cancellation of the order passed in his favour protecting his pay which he was drawing while serving at DRDA at the time of his induction in the services of the State in terms of Rajasthan Service Rules.

Vide order dated 11.5.2000 Annex.7 passed by Collector, Nagour the petitioner's pay was protected with effect from the date he was inducted in service.

The Collector was directed by the State Government vide Annex.9 to cancel the order of protecting the pay of petitioner and to recover the amount paid in excess as a result of the cancellation of the order. Thereafter vide Annex.10 dated 24th January, 2001, the Collector was directed to issue a show cause notice to the petitioner before giving effect to the order dated 29.12.2000 which eloquently speaks about the fraud played on citizens' right to minimum adherence to the principles of natural justice and fair play before his civil rights are affected. The communication dated 24.1.2001 from the Revenue Department of the Government of Rajasthan addressed to the District Collector is reproduced as under:-

"राजस्थान सरकार

राजस्व (ग्रुप-2) विभाग

क्रमांक प 07(36)राज/2/2000 जयपुर दिनांक 24/1/2001

जिला कलेक्टर

नागौर।

विषय: निरीक्षण प्रतिवेदन अवधि 97-99 के आक्षेप संख्या 14 की पालना के क्रम में।

संदर्भ: आपका पत्र क्रमांक प0 1 (सी)निजी/स्था/2000/158 दिनांक 17.1.2001

महोदय,

उपरोक्त विषयान्तर्गत इस विभाग के समसंख्यक पत्र दिनांक 29-12-2000 के सम्बन्ध में आपसे निर्देशानुसार यह भी लेख है कि श्री नागरचन्द भार्गव से वास्तविक वसूली करने से पूर्व उसे नैसर्गिक न्याय के सिद्धान्त के आधार पर वसूली करने से पूर्व कारण बताओ नोटिस भेजकर अपना पक्ष प्रस्तुत करने का अवसर प्रदान करावें। इसके बाद यदि उसके द्वारा कोई प्रतिवेदन प्रस्तुत किया जाता है तो उसको निरस्त करने के बाद वसूली प्रारम्भ करावें ताकि तकनीकी आधार पर यदि प्रकरण न्यायालय में जाता है तो राजय सरकार का पक्ष सुदृढ हो सके।

आपके संदर्भित पत्र द्वारा श्री भार्गव का चाहा गया मूल सेवाभिलेख (निजी पत्रावली किता-2 एवं सर्विस बुक किता-1) संलग्न कर भिजवाई जा रही है। कृपया इनकी पावती भिजवाने का श्रम करावें।

संलग्न: उपरोक्तानुसार

भवदीय

एस.डी.

अनुभागाधिकारी

प्रतिलिपि जिला शिक्षा अधिकारी माध्यमिक (प्रथम) नागौर को इस विभाग के पूर्व पृष्ठांकित समसंख्यक पत्र दिनांक 29-12-2000 में वर्णितानुसार कार्यवाही किये जाने के क्रम में प्रेषित कर लेख है कि उक्तानुसार कार्यवाही प्रारम्भ करने से पूर्व इस पत्र में स्पष्ट की जा रही स्थिति मुताबिक प्रक्रिया अपनाते हुये कार्यवाही की जावे।

अनुभागाधिकारी"

The aforesaid order, in literal sense, means that in compliance of order dated 29.12.2000, the Collector is directed that before recovery of the amount, he should issue a show cause notice giving an opportunity to incumbent to place his case. The letter further directs the Collector that if in pursuance of the show cause notice, any representation is received, before starting recovery, the same may be rejected. The letter states in no uncertain terms that the object of issuing show cause notice to be that if the incumbent takes recourse to his remedy on technical ground of non-compliance of the natural justice, the case of the State may be defended.

The directions vide Annex.9 contain the decision of the State Government to cancel the order of protecting the pay of the incumbent Annex.10 and the Collector has been directed to issue a show cause notice only by way of formality to take a stand in case the order of Collector is challenged that the same has been passed

after giving an opportunity of hearing, albeit Collector was not left with any discretion to take a decision on the submissions made by the incumbent, because an irreversible decision by the higher authority was already taken. He was merely required to carry out this mandate by making an ostensible appearance of fair deal and fair procedure.

Thus, it was clearly a case of pre-determining the issue by the authority issuing Annex.9 without affording any opportunity of hearing to the incumbent and that further direction for going through the rigmorale of giving an opportunity of hearing before passing the order of cancelling the earlier order regarding the pay protection. The conduct of the respondent in the present case clearly shows that the right of the petitioner to a fair procedure and effective opportunity of hearing before any order adverse to him is made, was stultified and subsequent rejection of representation is nothing less than committing a fraud on the petitioner's right to have a fair and just dealing at the hands of State before his rights are affected

adversely. The right of the petitioner to pay protection and the benefits derived by him under orders issued by the Collector was to be forfeited was a foregone conclusion notwithstanding the issuance of show cause notice. In these circumstances, subsequent rejection of representation of appellant and passing the order Annex.13 cannot be sustained on the artifice of Constitutional mandate, which is so much ingrained in the thread running through the right to equality before law enshrined under Article 14 of the Constitution. We remind ourselves of this basic feature of our Constitution vigorously stated in Royappa's case AIR 1974 SC 555, which reads as under:-

> "The basic principle which therefore, informs both Arts. 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose, J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all embracing scope and meaning, for to do so

> would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice3 of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Art. 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment."

We are of the considered opinion that the respondents in fact have acted in most arbitrary and unjust manner while dealing with the case of the appellant against all principles of fair play and discipline of good governance which is subject to rule of law and constraints of Constitutional mandate to act in

furtherance of and in protection of fundamental right of every citizen to prevent arbitrary free equal protection of law.

The availability of alternative remedy cannot come in his way for invoking extra-ordinary jurisdiction.

In the circumstances, we are unable to agree with the view of the learned Single Judge that the petitioner ought to be non-suited on the ground of availability of alternative remedy. The Annex.10 itself is enough to quash the consequential order passed by the Collector Annex.13.

Accordingly, the appeal is allowed. The judgment under appeal is set aside. The petition filed by the appellant is also allowed and the impugned order Annex.13 is quashed. Before parting with the case we may observe that Annex.9 having been passed admittedly without issuing any opportunity of hearing to the petitioner and even issuing of any show cause notice must be held to be void an initio and can be ignored

even without making an express prayer to that effect, least it be said that the petitioner has not challenged the Annex.9 independently.

The respondents shall pay the cost of the litigation to the petitioner which we quantify at Rs.5,000/-.

[GOPAL KRISHAN VYAS], J. [RAJESH BALIA], J.

babulal/